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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SCOTT EUGENE DIETLIN, Defendant and Appellant.	A125177 (San Mateo County Super. Ct. No. SC068099A)

I. INTRODUCTION

Pursuant to a negotiated disposition of a seven-count information, appellant pled no contest to a charge of communicating with a minor in an attempt to arrange a meeting in order to engage in lewd and lascivious behavior. (Pen. Code, § 288.4, subd. (b).)[1] The trial court denied him probation and sentenced him to state prison for the lower term of two years. Appellant claims that (1) the denial of probation constituted an abuse of discretion and (2) the requirement that he register as a sex offender violated his constitutional right to equal protection under the law. We disagree with both contentions, and hence affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

As the parties agree in their briefs to us, the underlying facts are not in dispute; we will therefore (as they both do) summarize those facts from the probation officer's report.

[1] All statutory references are to the Penal Code unless otherwise noted.

Appellant was, at the time of his arrest, a 35-year old male high school teacher in Petaluma. On November 5, 2008, the Burlingame and/or Millbrae police departments were advised that two teen-aged males in that area had created, as part of a prank, a fictitious "MySpace" computer account, claiming they were a sexually-interested 15-year-old girl. Someone claiming to be a teacher in Petaluma responded, and the parties then engaged in sexual conversations on the website.

The probation report recites: "On November 6, 2008, officers responded to the address of one of the boys and spoke with both of them about what had happened. They each admitted creating the fake account and said they had been contacted by the defendant who told them he was a teacher at a high school in Petaluma. The officer obtained the account information and returned to the police department to investigate the matter further. [¶] There were messages in the account inbox from the defendant. In the conversations, the defendant told the 'girl,' named 'Jackie,' that he was a high school teacher. He told Jackie he was attracted to her and that she was sexy, super hot and that she turned him on. He went on in detailed sexually explicit messages. [¶] Investigation showed the individual was in fact the defendant and the officer confirmed that he was a high school teacher in Petaluma. [¶] On November 15, 2008, a false account was created with the guise that it was the same individual the defendant had been contacting. The defendant contacted Jackie the next day and chatted for close to three hours. The conversation was sexual in nature and the defendant sent two photographs of himself. The first was a close up of his face and the second was of him with his shirt off and his pants unbuttoned. During this conversation, the defendant asked Jackie to send naughty photos of herself. They spoke of her age (16 years old) and the defendant reported to her that he was masturbating while on the computer. [¶] The officer posing as Jackie arranged to meet the defendant on November 18, 2008. However, on this date, the defendant claimed traffic was bad and said he had to get home before his wife returned. A second meeting was arranged for November 22, 2008. [¶] When the defendant arrived at the arranged location, he was taken into custody. He was transported to the police department and read his *Miranda* rights. [¶] In his statement to the police, the defendant

said he thought the person online was a man pretending to be an under aged girl. He further claimed he thought this individual had undergone hormone therapy and thought he was going to see a man. He indicated he had been role playing. [¶] The defendant was subsequently booked into the county jail without incident."

On March 5, 2009, the San Mateo County District Attorney filed a seven-count information against appellant. The information charged him, in count 1, with communicating with a minor with intent to commit a specific sexual offense, in violation of section 288.3, subdivision (a). Counts 2, 4 and 5 charged attempted transmission of harmful material for the purpose of seducing a minor, in violation of sections 288.2, subdivision (b), and 664. Counts 3 and 6 charged communicating with a minor and arranging a meeting with the same for the purpose of engaging in lewd and lascivious behavior, in violation of section 288.4, subdivision (a)(1). Count 7 charged communicating with a minor, arranging a meeting with the intent to engage in lewd and lascivious behvior, and going to the meeting place in violation of section 288.4, subdivision (b).

On April 8, 2009, and as a part of a negotiated resolution, appellant pled no contest to count 7. The court dismissed the remaining counts with a *Harvey*[2] waiver. On June 2, 2009, the trial court, consistent with the probation department's recommendation, denied appellant probation and sentenced him to state prison for the low term of two years.

Appellant filed a timely notice of appeal, but did not request or obtain a certificate of probable cause.

III. DISCUSSION

A. *The trial court did not abuse its discretion in denying appellant probation.*

As appellant correctly notes in his opening brief to us, our standard of review of an order denying probation to a convicted criminal defendant is abuse of discretion. This principle is the product of numerous cases, one of which summarizes the law thusly: " 'A

[2] *People v. Harvey* (1979) 25 Cal.3d 754.

denial or a grant of probation generally rests within the broad discretion of the trial court and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner.' [Citation.] A court abuses its discretion 'whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.] We will not interfere with the trial court's exercise of discretion 'when it has considered all facts bearing on the offense and the defendant to be sentenced.' [Citation.]" (*People v. Downey* (2000) 82 Cal.App.4th 899, 909-910.)

As our Supreme Court has stated: " 'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.)

The trial court's denial of probation was based largely on the probation department's report. That department based its recommendation that probation be denied on, among other things, the following observations of appellant: "The defendant's intentions in this matter are critical. He intended to meet a minor girl and take her to a motel to have sexual intercourse. Just because this did not actually occur, should not benefit the defendant. [¶] The defendant is manipulative and a liar. He cannot present one story as to his actions and has presented a number of differing scenarios to explain his behavior. He has said he went online to meet mature women, he has said he went online and met underage girls; he has said he has not done this before, then he said he had. The defendant insinuated during his interview that he was lonely at night while his wife was at work so he went online for sexual companionship. His judgment was impaired by the fact that he had been drinking and smoking marijuana. However, this officer notes that the police report for this case shows the online conversations for this

case actually occurred in the morning, midday and evening. . . . [¶] At the very least, his online behavior in this matter has occurred before. The present matter was not an isolated incident."

The trial court agreed with the probation officer's analysis. It stated, in the course of denying probation to appellant at the sentencing hearing: "It is the conduct in and of itself that the Court certainly has difficulty with, not only conduct of this specific incident but also the other incidents that are made reference to in the report. The fact this gentleman was a teacher at the time that these offenses occurred is troubling to the Court. Given his comments to the probation department, they seem to go back and forth on different issues. [¶] I don't feel that he is an appropriate candidate for probation. So, according to the charge of [section] 288.4(b) of the Penal Code, probation is denied."

Appellant argues that the trial court abused its discretion in so ruling because, among other things, of appellant's somewhat difficult early and adult life and the opinion of a psychiatrist retained by appellant and entered in the record that, under the circumstances, if released on probation, it was very unlikely that appellant would ever again offend such as he did here. Appellant contends he can overcome the "heavy burden" the law imposes on him, arguing: "Appellant's great and immediate remorse, intelligence, education, lack of a mental illness, his lack of a prior record, and his self-awareness, make him an obvious candidate for probation and not a danger to the community. As [the psychiatrist retained by appellant] found, appellant was not likely to re-offend. Society would be best served by having appellant supervised on probation and receiving the substance-abuse treatment he needs. To find otherwise was an abuse of discretion."

As noted, both the probation officer and the trial court disagreed with this argument, as does the Attorney General in his brief to us. We agree with their position, essentially because the record before us does not, contrary to appellant's arguments to us, overcome his admittedly "heavy burden" of showing an abuse of discretion. There are two significant hurdles which appellant simply does not overcome in his attempt to lift that burden.

The first is his admission to the probation officer, and his own psychiatrist, that the computer exchanges with the imaginary 15-year-old San Mateo County girl were far from the first of that sort. He conceded that he is attracted to teenagers because of his failure to develop normal sexual relationships with adults. As a consequence, and as a direct consequence of his "MySpace" computer activity, he met one 17-year-old girl, albeit then just "walk[ed] around" with her. And he apparently conceded to his own psychiatrist that he was in the regular habit of "indiscriminately chatting sexually with anyone" and that he had engaged in " 'probably about a dozen' underage interactions online."

Perhaps even more importantly, however, is the second consideration enunciated by the probation officer in recommending denial of probation: appellant's lack of candor and consistency in his interview with her. As quoted above, the probation report specifically recites that appellant was both inconsistent and untruthful in his responses to the probation officer, e.g., that: (1) he did most of his sexual "chatting" while his wife was at work in the evening, although his computer records showed this was simply not true; and (2) he went online to meet "mature women," but in fact later conceded he did so to meet "underage girls."

The probation officer's report (a report in some respects supported by that of appellant's psychiatrist) clearly establishes that the trial court did not abuse its discretion in denying appellant probation. Indeed, such was the recommendation of the full probation department, and not only the assigned probation officer. Further, appellant himself stated to that officer that "he deserved the incarceration."

B. *The sex offender registration requirement does not violate equal protection.*

Appellant's second argument is that the trial court's order that he register as a sex offender under section 290 violates his state and federal constitutional right to equal protection of the law.[3] That statute, the "Sex Offender Registration Act," specifically

[3] We do not agree with the Attorney General that this argument cannot be raised because appellant did not obtain a certificate of probable cause after his no contest plea. After such a plea, an argument on appeal that a sentence imposed pursuant to statutory

requires an individual found guilty of violating numerous specified provisions of the Penal Code, including section 288.4, to register as a sex offender. (§ 290.)

This contention also fails. Our Supreme Court has made clear, indeed twice, that the registration requirement of section 290 is mandatory and not subject to negotiation as part of a plea agreement. (See *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527 (*Wright*); *People v. McClellan* (1993) 6 Cal.4th 367, 380 (*McClellan*).)[4]

In *McClellan*, now-Chief Justice George wrote concerning the registration mandate of section 290: "[T]he sex offender registration requirement challenged in the present case is, like the parole term in [In re] *Moser* [(1993) 6 Cal.4th 342], a statutorily mandated element of punishment for the underlying offense. [Citations.] Thus, unlike the amount of a restitution fine, sex offender registration is not a permissible subject of plea agreement negotiation; neither the prosecution nor the sentencing court has the authority to alter the legislative mandate that a person convicted of assault with intent to commit rape shall register as a sex offender pursuant to the provisions set forth in section 290." (*McClellan, supra,* 6 Cal.4th at p. 380.)

Following on from this, four years later the court held: "Section 290 'applies automatically to the enumerated offenses, and imposes on each person convicted a lifelong obligation to register.' [Citations.] Registration is mandatory [citation], and is 'not a permissible subject of plea agreement negotiation.' [Citing *McClellan*] It is intended to promote the ' "state interest in controlling crime and preventing recidivism in sex offenders." ' [Citation.]" (*Wright, supra,* 15 Cal.4th at p. 527.)

Appellant cites no case to the contrary of *Wright* and *McClellan* but, rather, contends that this court must determine "whether equal protection requires that registration be discretionary for violations of section 288.4." In so arguing, appellant

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mandate violates either the state or federal equal protection clause does not require the issuance of such a certificate. (See, e.g., *People v. Hernandez* (2008) 166 Cal.App.4th 641, 646-648 (*Hernandez*), disapproved on another ground in *People v. Picklesimer* (2010) 48 Cal.4th 330, 338, fn. 4.)

[4] Both *Wright* and *McClellan* are cited in the People's brief to us, but neither is cited or discussed in either of appellant's briefs.

relies on our Supreme Court's holding in *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*), which one of our sister courts recently summarized thusly: "In *Hofsheier*, a 22-year-old defendant pleaded guilty to unlawful, nonforcible oral copulation of a 16-year-old female, a violation of section 288a, subdivision (b)(1). [Citation.] Following the mandatory sex offender registration requirements in section 290, the trial court ordered the defendant to register as a sex offender. [Citation.] The defendant contended on appeal that he was denied his constitutional right to equal protection of the laws because a person convicted of unlawful intercourse with a minor (§ 261.5) under the same circumstances would not be subject to mandatory registration. [Citation.] This court agreed and ordered the trial court's order granting probation modified to eliminate the mandatory registration requirement. (Ibid.) The Supreme Court agreed with this court, but directed this court to remand the case to the trial court to determine if it should exercise its discretion to require registration under former section 290, subdivision (a)(2)(E), which is now embodied in section 290.006. [Citation.]" (*People v. Kennedy* (2009) 180 Cal.App.4th 403, 409 (*Kennedy*).)

Numerous recent appellate decisions have cited and discussed *Hofsheier* and either relied on it to sustain an equal protection argument[5] or ruled that its holding is inapplicable.[6] The latter result obtains here because the ruling enunciated in *Hofsheier* does not mandate a similar result in cases, such as the present one (and others, such as

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[5] See *People v. Thompson* (2009) 177 Cal.App.4th 1424, 1428-1430 (*Thompson*); *People v. Luansing* (2009) 176 Cal.App.4th 676, 684 (*Luansing*), disapproved on another ground in *People v. Picklesimer, supra,* 48 Cal.3th at p. 338, fn. 4; *People v. Ranscht* (2009) 173 Cal.App.4th 1369, 1373-1374 (*Ranscht*); *People v. J.P.* (2009) 170 Cal.App.4th 1292, 1294-1299 (*J.P.*); *Hernandez, supra,* 166 Cal.App.4th at p. 650; *People v. Garcia* (2008) 161 Cal.App.4th 475, 480-482 (*Garcia*), disapproved on another ground in *People v. Picklesimer, supra,* 48 Cal.3th at p. 338, fn. 4.

[6] See, in addition to *Kennedy* (cited above), *People v. Cavallero* (2009) 178 Cal.App.4th 103, 113 (*Cavallero*); *People v. Valdez* (2009) 174 Cal.App.4th 1528, 1531-1532 (*Valdez*); *People v. Anderson* (2008) 168 Cal.App.4th 135, 141 (*Anderson*); and *People v. Manchel* (2008) 163 Cal.App.4th 1108, 1112 (*Manchel*), disapproved on another ground in *People v. Picklesimer, supra,* 48 Cal.3th at p. 338, fn. 4.

those cited in footnote 6) where both the charges brought and the factual circumstances are significantly different from the factual circumstances in *Hofsheier*.

This conclusion is supported by a review of the cases cited in footnote 5, *ante*, i.e., those subsequent appellate cases applying the *Hofsheier* rationale. All of those cases repeat—and many stress—the phrase "similarly situated" used throughout *Hofsheier*. They do so, clearly, because they deal with convictions of adult males for violations of, e.g., section 288a, subdivisions (b)(1) or (2) (*Garcia, Hernandez, J.P.* and *Luansing*), section 286, subdivision (b)(1) (*Thompson*), or section 289, subdivision (h) (*Ranscht*). They then contrast the mandatory sexual registration required for such violations under section 290, subdivision (c), with the discretionary registration required for a violation of section 261.5, i.e., precisely the same comparison (i.e., a "similarly situated" offense) made by the *Hofsheier* court.

By way of contrast, the appellate courts not finding an equal protection violation have, with one exception,[7] dealt with statutes *not involving* defendants "similarly situated" to those subject to discretionary registration under section 261.5. More specifically (and with the exception of *Manchel*), they dealt with convictions for violations of section 288, subdivision (c)(1) (*Cavallero* and *Anderson*), or section 262, subdivision (a)(1) (*Valdez*).

Perhaps the most significant holding for present purposes is *Kennedy*, a case in which panel of the Sixth District (the same court that decided *Cavallero and Anderson*) rejected a defendant's argument that the *Hofsheier* court's equal protection analysis extended to a charge of a violation of section 288.2, subdivision (b), i.e., attempting to exhibit harmful matter to a minor via the Internet—a charge very similar to that involved here.[8] The court held that there was no "similarly situated" offense as to which sexual

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[7] The exception is *Manchel, supra,* 163 Cal.App.4th at page 1112, a decision that has been criticized in several of the cases cited in footnote 5, *ante.*

[8] Perhaps significantly, this appellant was originally charged with three violations of section 288.2.

offender registration was discretionary, and thus held that the rule of *Hofsheier* did not apply.

In the course of so ruling, the *Kennedy* court wrote: "[T]his court will not extend the *Hofsheier* holding to this case, which compares mandatory registration for one convicted of attempted distributing or exhibiting harmful matter to a minor by the Internet under section 288.2, subdivision (b), with discretionary registration for one convicted under section 261.5 or section 288a, subdivision (b)(1). [¶] As we recently stated in [*Cavallaro*], the first prerequisite in establishing an equal protection claim is a ' " 'showing that the state has adopted a classification that affects two or more *similarly situated groups* in an unequal manner.' [Citations.]" ' [Citations.] Therefore, defendant here must establish that he was similarly situated to a group that is treated unequally under the existing law. Defendant contends he is similarly situated to those convicted of violating sections 288a, subdivision (b)(1) or 261.5. However, as in *Anderson*, and *Cavallaro*, this court finds defendant's argument unpersuasive. [¶] The defendants in *Anderson* and *Cavallaro* were convicted of committing a lewd act on a child who is 14 or 15 years old where the perpetrator is at least 10 years older than that child (§ 288, subd. (c)(1)). [Citations.] One reason this court found the equal protection holding in *Hofsheier* did not apply to the defendants in *Anderson* and *Cavallaro* is that the offense the defendants in [those cases] committed includes a specific intent element. [Citations.] 'The higher mental state required for a conviction under section 288 is a distinction that is meaningful in deciding whether a person convicted under that statute is similarly situated with one convicted under section 261.5.' [Citation.] The offense in *Hofsheier* (a violation of § 288a, subd. (b)(1)) does not contain a specific intent element. [Citation.] However, as in *Anderson* and *Cavallaro*, the crime in this case (attempting to send harmful matter to a minor with lustful intent and with the intent to seduce the minor) contains a specific intent element. Defendant was convicted of attempting to send harmful matter to a minor 'with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent, or for the purpose of seducing a minor.' (§ 288.2, subd. (b).) [¶] Further, in *Hofsheier*, 'the equal

protection analysis hinged on the fact that the defendant—had he engaged in unlawful, nonforcible sexual intercourse with the 16-year-old girl instead of [unlawful, nonforcible] oral copulation—would have *under no circumstances* been subject to mandatory registration. [Citation.] That is not the case here.' [Citation.] Contrary to defendant's claim, had defendant actually engaged in either unlawful, nonforcible sexual intercourse, or unlawful, nonforcible oral copulation with the alleged victim, who he thought was 13 years old, he would have been subject to prosecution under section 288, subdivision (a), for the commission or attempted commission of a lewd act on a minor under 14, a crime for which sex offender registration is mandatory. [Citations.] The fact that defendant—had he had sexual intercourse with a 13-year-old victim could have been charged under section 261.5, subdivision (d), an offense that is not subject to mandatory registration under section 290, rather than section 288, subdivision (a), does not suggest that mandatory registration based on defendant's conviction under section 288.2 constituted a violation of equal protection. [Citation.] [¶] Defendant has not shown ' " 'that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.]" [Citation.]' [Citations.] Since defendant has not proven a violation of equal protection, we reject his claim that mandatory registration as a consequence of his section 288.2, subdivision (b) felony conviction is unconstitutional. [¶] . . . . While we might agree that discretionary registration might be appropriate in certain felony section 288.2 cases, we are mindful that 'a court's authority to second-guess the legislative determinations of a legislative body is extremely limited,' and that it is 'a "well-settled principle that the legislative branch is entitled to deference from the courts because of the constitutional separation of powers." [Citation.]' [Citations.] And, as an intermediate appellate court, we are bound to follow and apply prevailing precedent. [Citations.]" (*Kennedy, supra,* 180 Cal.App.4th at pp. 409-411.)

We agree with this analysis and conclude it also applies here. Appellant is simply not "similarly situated" to a defendant convicted of either voluntary intercourse or oral copulation with a minor, i.e., the offenses in both *Hofsheier* and the cases following its ruling and cited in footnote 5, *supra*. Nor does appellant's counsel, either in his briefs to

us or at oral argument, cite any other "similarly situated" offense the conviction for which would subject a defendant to only discretionary registration as a sexual offender. There is, therefore, a rational basis for the mandatory sexual offender registration imposed on this appellant. We thus reject appellant's equal protection argument regarding his conviction for violating section 288.4.

IV. DISPOSITION

The judgment is affirmed.

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Haerle, J.

We concur:

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Kline, P.J.

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Richman, J.